Supreme Court, U.S.
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NO. 85-1612 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANIEL R. DE NARDO,

APPELLANT,

VS.

PATRICK MURPHY,

ALASKA PUBLIC EMPLOYEES ASSN.,

STATE OF ALASKA,

APPELLEES.

APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

MOTION TO AFFIRM JUDGMENT

Marc W. June,
BIRCH, HORTON, BITTNER,
PESTINGER & ANDERSON
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"If an action is commenced within the time prescribed and is dismissed upon the appeal or upon appeal after the time limited for bringing a new action, the plaintiff, or if the plaintiff dies and the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, or available against the action when brought under this provision."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANIEL R. DE NARDO, Appellant, vs. PATRICK MURPHY, ALASKA PUBLIC EMPLOYEES ASSN., STATE OF ALASKA Appellees.	)	Case No. _____

MOTION TO AFFIRM JUDGMENT

COMES NOW, defendant STATE OF ALASKA and hereby moves to affirm the judgment of the Ninth Circuit Court of Appeals in this matter.

This motion is made pursuant to Rule 16.1(c), Rules of the Supreme Court of the United States, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial that there is not to be further argument.

This motion is supported by the accompanying memorandum of law.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANIEL R. DE NARDO,	)	
	)	
Appellant,.	)	
	)	
vs.	)	Case No. _____
	)	
ATRICK MURPHY, ALASKA	)	
UBLIC EMPLOYEES ASSN.,	)	
TATE OF ALASKA	)	
	)	
Appellees.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION TO AFFIRM JUDGMENT

Statement of the Case

On January 30, 1986, the Ninth Circuit ourt of Appeals for the United States held ursuant to Wilson v. Garcia, _____ U.S. _____, 05 S.Ct. 1938 (1985) that Appellant DeNardo's laim was barred by the statute of limitation. ppellant DeNardo is seeking review by this court n the grounds that the statutory limitation was olled by DeNardo's unsuccessful pursuant of a rior action against the identical defendants. An dentical action brought by Mr. DeNardo in Alaska

State Court was dismissed. This dismissal was affirmed by the Alaska Supreme Court. Petition for Certiorari was denied. DeNardo v. Murphy, 454 U.S. 1096 (1982).

Argument

Rule 16.1(c) authorizes a motion to affirm the judgment sought to be reviewed if "it is manifest that the questions on which the decisions of the court depends are so unsubstantial as not to need further argument." There can be no doubt that the question raised by Mr. DeNardo is such that the underlying judgment should be affirmed.

Mr. DeNardo seeks to have the court apply A.S. 09.10.240 so as to revive his ability to renew his 42 USC §1983 action against the State of Alaska. A.S. 09.10.240 states as follows:

> "If an action is commenced within the time prescribed and is dismissed upon the appeal or upon appeal after the time limited for bringing a new action, the plaintiff, or if the plaintiff dies in the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, or available against the action when brought under this provision."

Mr. DeNardo claims that his action comes within the ambit of A.S. 09.10.240 due to its being filed within one year of the denial of certiorari. As the Ninth Circuit correctly pointed out, the statute's one year limitation begins to run only upon dismissal by the trial court or reversal on appeal. See Denardo v. Murphy, _____ F.2d _____, Op. No. 85-3475, 85-3773, at p.8 (January 30, 1986). This construction of A.S. 09.10.240 is consistent with Alaska law. See Barrow Development v. Fulton Insurance Company, 418 F.2d 316, 319-20 (9th Cir. 1969); Atlas Enterprises v. Consolidated Construction Co., 572 P.2d 68, 70-71 (Alaska 1977).

Since the Ninth Circuit construction of A.S. 09.10.240 is consistent with Alaska law, it is clear that Mr. DeNardo has failed to raise any sort of substantial question for review by this court. For that reason, the underlying judgment should be affirmed.

RESPECTFULLY SUBMITTED this _____ day of April, 1986 at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER & ANDERSON
Attorneys for State of Alaska

By:_____
Marc W. June